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## PART III.

### Legislative Measures and Rules thereunder.

NOTIFICATION.

*No. 78—L. C., dated 19th September* 1910.

Under Rule 40 of the Rules for the conduct of business of the Mysore Legislative Council, the accompanying report of the Select Committee on the Code of Civil Procedure Bill is published for general information, along with the list showing the amendments made by the Select Committee therein.

By Order,
S. HIRIYANNAIYA,
*Secretary, Mysore Legislative Council.*

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### Report of the Select Committee on the Code of Civil Procedure Bill.

We, the members of the Select Committee appointed for the consideration of the above Bill, have the honor to submit the following report to the Council.

The changes that we have effected, after a very careful consideration of the provisions of the Bill, are explained below :—

*Title and Preamble.*

We have substituted the word "Mysore" for the words "the territories of Mysore" wherever it occurs in the Bill as that word has been defined by the General Clauses Regulation, Section 3 (24), as meaning "the territories of Mysore."

*Definitions.*

*"Deputy Commissioner."*

We have omitted the definition of this term from the Bill, as it has been defined in the General Clauses Regulation, 1899. [*Vide* Section 3 (9)]

*"Foreign Court."*

With a view to include in the definition of this term the Civil Courts established in the Civil and Military Station of Bangalore, we have substituted the following definition for the one in the Bill :—

"Foreign Court" means a Court not established or continued by the Government of Mysore.

*"Mysore Military Forces."*

"Mysore Military Forces" means and includes the Mysore Imperial Service Cavalry and Transport Corps, the Local Service Troops, (*viz.*, the Barr and Silledar Troops) and the Palace Troops.

"Palace Troops" means—

The Body Guard (Cavalry), the Barr Battalion (Infantry), the Golundauz (Artillery), and the English Band, attached to the Palace of His Highness the Maharaja of Mysore.

*"Pleader."*

For the sake of clearness we have recast the definition of "Pleader" as follows :—

"Pleader" means any person enrolled under the law for the time being in force in Mysore relating to Legal Practitioners, and entitled to appear and plead for another in Court.

*Clause 4, Sub-clause (2).*

This has been omitted as unnecessary, as sub-clause (1) sufficiently provides for the object in view.

*Clause 7 (b).*

The reference to Section 115 made herein has been omitted as the provisions of that section are necessary until a new Small Cause Courts Regulation is passed.

*Clause 9.*

This clause as it stands in the existing Code excepts from the jurisdiction of Civil Courts "suits of which their cognizance is barred by any enactment for the time being in force" (*vide* Section 11).

But on the recommendation of the Special Committee of 1907, the British Indian legislature has substituted in their new Code for the words quoted above the following, *viz.*, "suits of which their cognizance is either expressly or impliedly barred" (*vide* Section 9, para 1 of Act V of 1908). So far as we can make out, the object of the change seems to be to make it clear that as the Civil Procedure Code is not an exhaustive enactment, there may be other bars to the entertainment of a suit in a Civil Court than a merely statutory bar; as for instance, suits that would be thrown away on the ground of the prayer in the plaint being opposed to public policy. We are of opinion that this kind of bar is not one affecting the jurisdiction of the Court to entertain and decide the suit, but refers to the validity of the claim itself under the rules of substantive law applicable to it. As the law stands at present, Courts have never felt any difficulty in practice in giving effect to such objections to the validity of claims brought before them.

It is possible, however, to conceive of a class of cases which, though not "expressly barred" in any enactment, may nevertheless be excluded from the jurisdiction of Civil Courts by reason of a necessary implication arising out of the language used in an enactment, with the object of limiting jurisdiction. Such a bar would be an "implied bar" inasmuch as it may not be stated in express terms but would still depend on the positive rule in the enactment which raises the implication.

To make this matter clear and to show that no suit of a civil nature can be excepted from the jurisdiction of a Civil Court without a bar (express or implied) created by an enactment of the legislature, we have added the words found in the existing Code "by any enactment for the time being in force."

*Clause 12.*

This has been omitted. It is unnecessary in Mysore as the Code applies to the whole State and as all the Courts in the State are subordinate to the Chief Court.

*Clause 29.*

This provision is the same as that enacted by Section 650A of the existing Code. But we are of opinion that the power granted by this clause should not be exercised by the Courts of the State without express direction from Government. We have accordingly added the following proviso to this clause as in the corresponding section of the British Indian Code, *viz.*, "provided that the Government has, by notification in the official Gazette, declared the provisions of this section to apply to such Courts."

*New Clause 44.*

We consider that provision should be made as in British India for execution in Mysore of decrees of Courts of other Native States in alliance with His Majesty. We have therefore added the following clause as clause 44, *viz.*:—

"44. The Government may, by notification in the official Gazette, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees, may be executed in Mysore as if they had been passed by the Courts in Mysore."

*Clause 54.*

The words "Gazetted subordinate of the Deputy Commissioner" have not been defined anywhere. We have therefore substituted for these words here and in other places where they occur in this Code, the words "Revenue Officer not below the rank of a Deputy Amildar," except in sub-clauses (1) (*c*), and (2) of clause 70 where for the words "any Gazetted subordinate of the Deputy Commissioner" the words "or other Revenue Officer" have been substituted.

*Clauses 55 and 60.*

(1) In the existing Code exemption from arrest in execution of a decree for debt passed by any Court of law has been granted to all persons belonging to the Mysore Silledar or Barr Force (*vide* Section 336). The Committee have accepted the suggestion made in this matter that this exemption should be extended to the members of all the Military Forces including in the meaning of this term the Palace Troops also.

Similarly, in clause 60 of the Draft Bill the exemption from attachment of pay and allowances and arms and accoutrements, etc., enjoyed by certain officers and men in the Mysore Silledar and Barr Force has been extended to all the officers and men belonging to the Mysore Military Forces. The benefit of the exemption from attachment provided for in the Draft Bill in respect of any amount payable out of a Retiring Fund (*vide* sub-clause (*r*) in the Draft Bill) to the officers and men of the Local Service and Imperial Service Regiments has likewise been extended to the officers and men of all the Military Forces in the State. We have also made an addition to *sub-clause* (*g*) of this clause, so as to give power to Government to exempt from attachment, by means of a notification in the Gazette, stipends and gratuities payable out of any Service Family Pension Fund which may hereafter be instituted.

(2) *Para* (*o*).—We have omitted this paragraph as inapplicable to this State. Section 162 of the Revenue Code is the only rule in force creating exemption from sales for the recovery of arrears of land revenue, and it contains no other exemptions than those which apply under the provisions of the Civil Procedure Code to executors of civil decrees.

(3) Under Rule 2 of the Chief Commissioner's Notification No. 266, dated 17th November 1877, all inam lands granted to religious and charitable institutions and for the maintenance of persons rendering service therein are exempt from attachment under a process issued by a Civil Court. Strictly speaking, they do not form

part of the property of the judgment-debtor at all; but to rely on this fact would often necessitate the appearance of some one on behalf of the institutions to put forward claims on their behalf. The invalidity of the attachment is, however, well known to parties, and nothing but vexatious litigation would result from such attachment being allowed. As it is reported that the practice in the Courts is not uniform in this respect, we have deemed it expedient to add a new sub-clause (*s*) giving effect to the prohibition contained in the said notification.

(4) A representation was made to us that the benefit of exemption from attachment in execution of a decree should be extended to the earnings of certain classes of persons working under the Mining Companies in the Kolar Gold Fields area. We consider it unnecessary to make any change in the law, which in this respect is the same as in British India and which would probably give rise to claims for exceptional treatment on behalf of other similar bodies.

*Sub-clause 2, clause 60.*

We have added words to para (*a*) of this sub-clause with a view to provide that the exemption from attachment conferred by the clause under certain circumstances on houses, buildings, site or land, shall not apply to cases where decrees have been obtained on a specific mortgage or charge of such houses, etc. This view is only in accordance with the existing case law on the point (*vide* Indian Law Reports, 4 Bombay 25) and obviates, in the opinion of the Committee, what would otherwise be a real hardship. The Committee see no reason why a man who first mortgages his property should afterwards turn round and claim its exemption from attachment.

*Clause 58.*

We have restored the provisions of the existing Code (Section 342) as more equitable. According to the provision in the Draft, a judgment-debtor refusing to obey the injunction of a Court granted in execution of a decree, other than for the payment of a sum of money, would be liable to detention in prison only for six weeks, even though the relief prayed for and granted in the decree and which the judgment-debtor chooses to disobey might be, for the parties, far more important than, say, a decree for the payment of a sum of rupees fifty. We are not sure that the alteration in the British Indian Code was deliberately meant, as no reason has been assigned for it.

*Proviso (a) to sub-clause 1 of clause 73.*

We have, in the interests of clearness, retained the words "as such" to be found in the existing Code between the words "mortgagee or incumbrancer shall not" and "be entitled to share."

*Clause 76.*

This clause is unnecessary as the provisions of clause 75 read with Order XXVI are adequate. Reference has been made in Rule 9 of Order XXVI, corresponding to Section 392 of the old Code, to rules being framed by Government as to the persons to whom commissions for local investigations may be issued. As a substantive provision of law enabling the Government to frame such rules is wanting, we have inserted a new clause which in place of the one repealed by us, will be numbered as clause 76 of the Bill.

"Power of Government to make rules regarding commissions for local investigations."

"76. The Government may make rules as to the persons to whom commissions to make local investigations may be issued."

15. *Clause 94 (a).*

Under clause 56 of the Code, no woman can be arrested or detained in a Civil prison *in execution of decrees for money.* We are of opinion that they should not be denied that privilege *before judgment.* We have accordingly added the following proviso to this sub-clause, *viz.*, "provided that the Court shall not order the arrest or detention of a woman in the course of a suit for recovery of money."

*Clause 98.*

There is a conflict between the Chief Court Regulation, and the Civil Procedure Code and Criminal Procedure Code at present. The Regulation requires that the case should necessarily go before a Full Bench, if there is a difference of opinion. The Civil Procedure Code gets over the difficulty by saying that if there is a conflict, the Chief Court Regulation should be followed. The Criminal Procedure Code (Section 429) says nothing about the conflict. The present practice in the Chief Court is to refer all Civil cases (of difference of opinion) to a Full Bench and to follow Section 429, Criminal Procedure Code, in Criminal cases.

As there may possibly be other Courts (though actually there are none such in Mysore now) with a plurality of Judges, the Committee consider it necessary to have these provisions in both the Procedure Codes. Section 15 of the Chief Court Regulation should likewise be retained to make the Regulation complete in itself. But it is undesirable that there should be a conflict between the different Codes. It is therefore proposed to remove the conflict in the following manner.

The Civil Procedure Code Bill, Clause 98, shall read as follows :—

Decision where appeal heard by two or more Judges.

"(98) (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed."

The Criminal Procedure Code, Section 429, will be left as it is.

The Chief Court Regulation, Section 15, will be amended by substituting the following for the second sentence of sub-section (3) :—

"When a Bench of the Chief Court consists of only two Judges, and there is a difference of opinion between such Judges on any material question pending before it, such question shall be disposed of in the manner prescribed in Section 98 of the Civil Procedure Code or Section 429 of the Criminal Procedure Code, as the case may be, or, at the discretion of either of the Judges composing the Bench, it shall be referred to a Full Bench and the decision of the majority of Judges on such Full Bench shall be the decision of the Chief Court" (*vide* Schedule IV, as amended by the Committee).

The provision in the Criminal Procedure Code is no doubt imperfect, as it does not provide for a Court in which there are no odd Judges. But such a difficulty is not likely to be felt here and so we may let the matter alone.

*Clause 100.*

It was suggested to the Committee that sub-clause (*d*) of this clause might be omitted in order that the law in respect of second appeals on questions of fact might be assimilated to that obtaining in British India. On a very careful consideration of the question in all its aspects, the Committee are unanimously of opinion that the existing law which has been in operation in the State for over a quarter of a century has given complete satisfaction to the people and that no sufficient reason has been shown why it should now be altered. The Committee therefore beg to recommend that this sub-clause be retained in the Bill.

*Clause 102.*

In the existing Code, a second appeal is prohibited in cases of a small cause nature whose subject matter does not exceed rupees fifty in value. This provision was of some practical utility when suits up to the value of rupees fifty were not always treated as small cause suits. But as throughout the State such suits are now treated as small cause suits, the section (Section 586) has become incapable of practical application. With a view to curtail the right of second appeal in petty suits and relieve also to some extent the congestion of work said to exist in the Chief Court, recommendations were made to the Government that the limit fixed in Section 586 might be raised to rupees five hundred as in British India. We understand that it was to meet in some measure this recommendation that it was provided in the Draft Bill that the limit should be raised to rupees one hundred

with power to Government to further raise it by means of a notification to rupees two hundred, should such a course seem to be expedient hereafter. The Committee had the advantage of perusing the statistics furnished by the Chief Court in regard to the diminution of work that would probably ensue, if the provision in the Draft Bill were allowed to take effect. It was found that the relief to the Chief Court would be quite inappreciable even if the limit were raised to rupees two hundred at once, while having regard to the average value of litigation in the State the change in the existing law would not be welcomed by the public. In these circumstances, the Committee have arrived at the opinion that it would be better to drop the clause altogether from the Bill.

*Clause 123.*

We have simplified the constitution of the Rule Committee to some extent. The British Indian High Courts are composed of a much larger number of Judges than our Chief Court. We have therefore considered it sufficient to have one Judge of the Chief Court on the Committee, and to have two Judges of the Subordinate Courts and two Advocates. Of course, the rules will be considered independently by the remaining Judges of the Chief Court also before being finally adopted.

Sub-clause (2) of this clause which provides for this will, as altered, read as follows :—

"123. (2) The Committee shall consist of the following persons, *viz.* :—

(*a*) A Judge of the Chief Court who shall be the President of the Committee.

(*b*) Two Judges of Civil Courts subordinate to the Chief Court; and

(*c*) Two Advocates enrolled in the Chief Court."

As a consequential change we have omitted a portion of the sub-clause (3). We have also omitted the provision contained in sub-clause (5) regarding the remuneration payable to the Secretary to the Committee, as it is unnecessary to provide for this in a Regulation.

*Clauses 130 and 131.*

We have added clauses 130 and 131 which seem to have been omitted in the draft by an oversight. They enable the Chief Court to make *Practice Rules.*

*Clause 137 (2).*

As there is only one language which is recognised in this country, we consider it unnecessary to retain the last two lines of this sub-clause and we have omitted them accordingly.

We have also omitted sub-clause (3) of clause 138, as under the Mysore General Clauses Regulation a power to make orders, rules or bye-laws includes the power to add to, amend, vary or rescind such order, rule or bye-laws (*vide Section 21*).

*Clause 152A.*

Provision has been made in Rule 66A of Order XXI for protecting Judges from actions in regard to acts done by them in the discharge of their duty. Being a substantive provision of law, we have transferred it to the body of the Code as clause 152A instead of retaining it in the schedule.

We take this opportunity of recommending that the Judicial Officers' Protection Act, XVIII of 1850, of the Government of India which is a very simple and short enactment and which extends protection to many other Judicial Officers also may be introduced into this State at an early date.

SCHEDULE I.

*Order 1, Rule 11.*

This rule may more appropriately form part of Rule 10 (*vide* Section 32 of the existing Code). We have also made a slight change in the wording of the rule.

*Order V, Rule 25.*

This is the same as old Section 89. We consider that the proviso may be omitted and re-enacted into a separate rule (Rule 26), as has been done in the British Indian Code, as follows:—

"Service in foreign territory through a Court or other authority."

"26. Where Government has, by notification in the official Gazette, declared that any summons issued under this Code may be served by any Court or authority of the place where the defendant is residing, the summons may be sent to such Court or authority by post or otherwise for the purpose of being served upon the defendant; and if the Court or authority returns the summons with an endorsement signed by the Judge or other officer of the Court or authority that the summons has been served upon the defendant in manner hereinbefore directed; such endorsement shall be evidence of the service." As now framed it allows Government to ascertain what foreign Courts are willing and competent to render such help and to notify the classes and names of such tribunals in a notification in the Gazette.

*Rule 27.*

The words "not belonging to the Mysore Military Forces" have been added after "Public Officer" in Rule 27 as is done in British India so as to exclude the case of such officers, the procedure for service of summons on whom is provided for separately in the next following rule.

*Rule 28.*

We have also inserted the words "in the Mysore Military Forces" after the word "soldier" in Rule 28, so as to make the meaning clear.

*Order VII, Rule 10 (1).*

We have recast this as follows so as to make the meaning clear, *viz.*, "10 (1). If, at any stage of the suit, the Court finds that it should have been instituted in another Court, the plaint shall be returned to be presented to such Court."

*Order XVI, Rule 2 (3).*

The authority to fix the scale of expenses to be paid to witnesses is left undetermined. We consider that this power should rest with the Government. We have accordingly substituted the following for this sub-rule.

(3) "In fixing the scale of expenses, regard shall be had to any rules made by Government in that behalf."

*Rule 16 (2).*

To ensure that the power conferred on the Courts by this sub-rule may not be exercised without sufficient discrimination, we have added the words "if sufficient cause is shown," between the words "may" and "require."

*Rule 19 (b).*

We have omitted the words "or steamer" and "or other established public conveyance" occurring here as unnecessary at present.

*Order XXI, Rule 48 (3).*

To sub-rule (3) of this rule an addition has been made (restoring what is contained in British Indian Code) so as to make the provisions of the clause apply to cases where the judgment-debtor though residing outside Mysore yet receives a salary or allowances out of Mysore revenues or the funds of a Railway Company or local authority carrying on business within the limits of Mysore. Such a provision seems to be necessary. The sub-rule will now read as follows:—

"(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the Railway Company or local authority, as the case may

be, while the judgment-debtor is within the limits of Mysore and while he is beyond those limits, if he is in receipt of any salary or allowances payable out of Mysore revenues, or the funds of a Railway Company carrying on business within the jurisdiction of the Government of Mysore or local authority in Mysore; and the Government, Railway Company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule."

*Rule 66 (2).*

The provision regarding notice contained in this sub-rule appears to us to introduce an innovation into the existing procedure which may retard instead of facilitating the disposal of execution petitions, as it requires that a special notice shall be given to the judgment-debtor immediately prior to the actual drawing up of a proclamation by the ministerial officers of the Court.

If, however, all that is intended in the new rule is the giving of an opportunity to the judgment-debtor to be heard regarding the terms proposed to be embodied in the sale proclamation, then there is no need for a new provision, as the existing practice of our Courts based on the Rules of Practice Nos. 28, dated 8th March 1880, and 32, dated 22nd September 1880, make adequate provision. We, therefore, recommend that the words "shall be drawn up after notice to the decree-holder and the judgment-debtor and" occurring herein be omitted.

*Rule 71.*

The words "or to the Deputy Commissioner, as the case may be," have been omitted. It is clear that their retention in the British Code was an oversight. When decrees are transferred to Deputy Commissioners for execution, the procedure applicable is to be found in the third schedule, or in rules to be framed by Government under Section 70 of the Code.

*Order XXVI, Rule 4 (3).*

We have omitted this sub-rule as we cannot conceive of any case of a commission issued under this Code being made returnable to a Court other than the Court issuing it. The retention of the corresponding provision in the existing Code seems to be due to an oversight. In the Civil Procedure Code of 1859 there was need for such a provision (*vide* Section 177 of Act 8 of 1859), as under that Code Courts inferior in grade to a principal Civil Court in a District had no power to issue a commission. But the provision for the return of a commission to another Court ought to have been but was not removed, when subsequently all Civil Courts were empowered to issue commissions.

*Rule 14.*

We consider it necessary that the Court ordering a partition (especially of houses in crowded localities) should be entrusted with a very wide discretion as to the mode in which the partition is to be actually effected. Representations have been made in the Representative Assembly regarding certain cases of hardship in the Mysore City consequent on the enforcement of building bye-laws issued by the City Improvement Trust Board. We, therefore, recommend that the Partition Act, 1893, of the Government of India which provides facilities in the matter may be introduced into this State. We consider it inexpedient to introduce the provisions of that Act into the Code.

*Order XXXIII, Rules 6 and 9.*

As the Government have not appointed any Government Pleader in Mysore, we have substituted the words "Deputy Commissioner" for the words "Government Pleader" in the Rules. This will be in accordance with the existing practice as laid down in the present Code.

*Order XXXIV.*

The chief difficulty that occurred to us in respect of this order was, whether it would not create a revolutionary change in the manner of realising mortgage debts. what is done at present in most of such cases is that the bonds contain a personal

agreement to pay and the creditor asks for and obtains a decree to enable him to recover the money due both from the mortgaged property and personally from the debtor. The time for payment contemplated by this order is generally not fixed at all by the decree, and the decree-holder is left free to bring the mortgaged property to sale or to proceed against the debtor personally or against his property at any time after the decree or in any order he pleases. Under Rule 6 of this order, the Court can pass a decree against the person of the debtor only after it has been found that the mortgaged property has not realised enough at a sale. If this rule applied to all cases, the change would no doubt be revolutionary, as it would prevent the creditor who may have taken an insufficient security relying on the personal solvency of the debtor also, from taking any steps to protect his interest, till the lapse of a considerable period after the decree.

We find however that the proposed procedure is not meant to affect such cases These limitations will not apply to cases in which a personal decree has been *asked for and obtained*. The period of six months is the maximum period allowed to be fixed for payment, and the Court may fix any shorter period according to the largeness of the sum, the value of the security and other circumstances.

These considerations go to show that there is not much risk in retaining the provisions of this order. It is however to be feared that Courts may drift into the habit of considering that the rules of procedure assume a change in the *substantive law* and that whatever the terms of the bond and the claims may be, they should invariably follow this procedure literally. There is also a risk that inexperienced pleaders not realising the significance of the omission to ask for a personal decree may neglect to do so and draw up plaints in close adherence to the rules in question, which of course should be restricted only to cases to which they properly apply.

To guard against all this, it is considered sufficient to add a cautionary rule as rule 14 as follows :—

Savings

14. "Nothing in this order shall be construed to give any party a remedy to which he has not got by his contract or the law applicable thereto, or take away or in any manner limit any remedy that he is entitled to under such contract or such law."

*Order XXXVII, Rule 1.*

We have omitted the last three paras of this rule as unnecessary and have made a verbal change in para 1.

*Order L.*

For the sake of clearness, we have recast the first para of Rule 1 of this order as follows :—

Small Cause Courts.

"1. The provisions hereinafter specified shall not extend to Courts of Small Causes constituted under any law for the time being in force in Mysore or to Courts exercising the jurisdiction of a Court of Small Causes, that is to say :—"

A few verbal changes have been made to correct obvious errors in the Bill as originally published, but they are unimportant and do not call for any remarks.

As the chief alterations effected by us in the Bill are few, we deem it unnecessary to republish the Bill.

As we could not submit the report to the Council within the time originally fixed, an extension of time was kindly granted by the Dewan up to the end of September 1910.

H. V. NANJUNDAYYA.
S. NARAYANA RAO.
C. SRINIVASIENGAR.
M. C. RANGIENGAR.
D. VENKATRAMAIYA.

14th September 1910.